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IN THE

Supreme Court of the United States

October Term, 1962

No. 130

MATHIASEN TANKER INDUSTRIES, INC.
Petitioner

versus

ROBERT LEE MASON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENT MASON

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IN THE

Supreme Court of the United States

October Term, 1961

No. 985

MATHIASEN TANKER INDUSTRIES, INC.,
Petitioner

versus

ROBERT LEE MASON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENT MASON

OPINION BELOW

The Opinion of the Court of Appeals for the Fourth Circuit (Chief Judge Simon E. Sobeloff, Herbert S. Boreman, C. J.) is reported at 298 F. 2d 28 and dissenting opinion (Clement F. Haynsworth, Jr. C. J.) 298 F. 2d 33. These Opinions are also printed in Petitioner's Appendix pp. 2A-15A. Petitioner shipowner filed a petition for re-

hearing in the Court of Appeals, which was denied by the Court, the dissenting judge; Clement F. Haynsworth, C. J., joining in the denial of rehearing with the majority court.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was rendered on January 3, 1962. The Petition for rehearing in that Court was denied on March 22, 1962. The Petition for a Writ of Certiorari was filed on May 21, 1962. It is believed there is want of jurisdiction in this Court under Title 28, U. S. C., Sec. 1254(1) which is claimed by Petitioner, since these proceedings are neither final nor complete (See pp. 11, 12).

QUESTION PRESENTED

In this Jones Act (46 U. S. C. 688) case, the District Court jury found negligence and unseaworthiness of Petitioner shipowner upon separate interrogatories and thereupon fixed liability. Petitioner shipowner did not appeal. On separate interrogatory the District Court erroneously charged the jury on respondent seaman's contributory negligence based upon improper and unconnected evidence leading the jury to find contributory negligence. Respondent seaman appealed. The Court of Appeals reversed the District Court's erroneous charge on contributory negligence, ordering a new jury trial as to this, upon proof of proper evidence of contributory negligence, further ordering redetermination of damages which may be affected or mitigated by the new trial of issue of respondent seaman's contributory negligence, if any. The question presented is:

Whether the Court of Appeals can, where the issues are separable, order a new trial as to the appealed issue because of erroneous District Court charge on that issue.

STATUTES INVOLVED

The Statutes involved are the Jones Act, 46 U. S. C. 688, incorporating by its terms the Federal Employers Liability Act, 45 U. S. C. 51.

COUNTER STATEMENT OF THE CASE

This counter statement of the case is deemed necessary in correcting certain substantial and important inaccuracies and omissions in the shipowner's Petition. Respondent seaman Mason joined the vessel MISSION CAPISTRANO in the capacity of Oiler performing duties in the engine room of the vessel. Upon joining the vessel he found that the blower platform in the engine room continuously retained standing oil which came from the leakage of bearings of the blowers. He made complaints to the Chief Engineer because he had to wade through this oil each watch while performing his duties in oiling the blowers. The blowers which are power driven encased fans supplying air to machinery and forced draft to boiler furnaces are located at the top of the boilers resting on a steel platform. They are reached by a succession of steel ladders at different stages running from the bottom of the engine room upward to the ceiling. This machinery must be continuously oiled every hour by the Oiler on watch. After wading through the oil on each watch Mason attempted to wipe the oil from the leather soles of his shoes, carrying a rag for this purpose. Nevertheless, his only two pairs of shoes stayed continuously oil soaked. On the morning of September 29, 1958 after the vessel had left Norfolk and was at sea, Mason climbed up the succession of ladders to the top of the engine room to check the blowers. He had to wade through the oil on the platform in order to do so and wiped his shoes

off with his rag. After finishing his duties on the boiler platform he descended three sets of ladders safely to the ladder leading down to the evaporator flat. While beginning to descend this ladder with both hands on each side of the ladder railing, his right shoe soaked in oil, skidded under him and he plummeted head over heels down the ladder sustaining severe head and facial injuries, rendering him unconscious. He was taken off the ship at sea to the hospital at Charleston, South Carolina and later became interned at other hospialts.

At trial respondent seaman produced crewmen witnesses, all of whom testified about the standing oil being on the blower platform, the requirement that oilers including respondent must wade through it for their duties and the dangerous conditions created thereby. The shipowner produced no live witnesses as to the occurrence but submitted depositions. Previous to trial the respondent seaman's counsel had been informed that the shipowner's counsel proposed to introduce into evidence totally unrelated collateral incidents of Mason having fainted on two occasions in different engine rooms of different ships some years before; and that counsel would request the District Court to charge contributory negligence on this evidence, although there was no casual connection between Mason's present injuries and the totally unrelated fainting incidents of years past. After all of the evidence was in, notwithstanding that the shipowner had produced no casual connection between Mason's injuries and the unrelated fainting incidents of years ago, and notwithstanding the firm and repeated objections of Mason's counsel, the District Court erroneously charged the jury on Mason's contributory negligence based upon this improper evidence. The District Court further allowed shipowner's counsel to show that some "pills" were found in

plaintiff's effects after he was removed from the vessel, which were totally unrelated to plaintiff's injuries, but carried an ominous inference to the jury. In charging the jury on contributory negligence, the District Court in admitting this improper evidence on the issue of contributory negligence, failed to satisfactorily remove from the consideration of the jury the unconnected incident of the "pills" being found. The District Court then charged the jury that this contributory negligence would reduce the damages Mason was otherwise entitled to. In separate interrogatories the Court charged the jury (1) as to shipowner's negligence; (2) as to unseaworthiness of the vessel and; (3) the contributory negligence of seaman Mason. The District Court specifically charged the jury that their first issue for determination was the liability of the shipowner for negligence or unseaworthiness before they could consider either the contributory negligence of Mason or the damages he would be entitled to. The jury first found the shipowner guilty of both negligence and unseaworthiness. Having been erroneously charged by the District Court on the contributory negligence of Mason because of the totally unrelated and unconnected fainting incidents of a number of years past, the jury also found contributory negligence, rendering a totally inadequate award of Two Thousand ($2,000.00) Dollars. Mason had sustained a substantial economic loss of wages of over a years time and serious and permanent head and facial injuries.

Respondent Mason appealed the District Court's erroneous contributory negligence charge to the Court of Appeals seeking a new trial as to the issue of his contributory negligence which was found because of the District Court's erroneous charge. The shipowner Petitioner being content with the adjudication of its liability and the

totally inadequate award, did not appeal the judgment entered against it for its negligence and unseaworthiness.

The Court of Appeals, through Chief Judge Simon E. Sobeloff and Circuit Judge Herbert S. Boreman, held that the District Court erroneously charged the jury on contributory negligence and the shipowner having failed to appeal the determination of its liability, ordered a new trial as to the issue of contributory negligence and further redetermination of damages which may be mitigated by a finding of contributory negligence, if any.

Petitioner shipowner has been less than candid or fair with this Court in failing to point out that he does have a new jury trial to prove the contributory negligence, if any, of the respondent seaman. (See footnote 5, Court of Appeals Opinion; Pet. App. p. 11A). The Petitioner shipowner completely misleads this Court in its Petition in stating that the Court of Appeals remanded the case solely for the assessment of damages (Pet. pp. 3, 15). The omission to inform the Supreme Court of this part of the Court of Appeals remand for jury trial of contributory negligence is completely inexcusable.

ARGUMENT

POINT I. THE PETITION SHOWS NO REASONS FOR REVIEW, SINCE PETITIONER'S STATED QUESTION URGED HAS BEEN DECIDED MANY TIMES BY THIS COURT AND THERE IS NO CONFLICT WITH COURT OF APPEALS DECISION.

The shipowner's Petition and Appendix amounting to 56 pages contains neither a concise statement of the case nor is it presented with accuracy, brievity and clearness (see Supreme Court Rule 23 (1) (e), (4); Kennemer v. Billington, 323 U.S. 709 (1944); Brown v. Krietmeyer,

275 U.S. 496, 497 (1927)) but notwithstanding the rambling and indiscriminate citation of Supreme Court cases in the Petition, an attempt will be made to answer the argument it is believed the shipowner Petitioner is seeking to make. The Petitioner's question as to whether the shipowner in a Jones Act (46 U. S. C. 688) case has an equal right with the seaman to a jury determination of the issues, which the shipowner presents as "a single question of law which has never been considered by this Court" (Pet. p. 1), has frequently been answered by this Court. Unquestionably the shipowner in a Jones Act case brought by the seaman in a civil action at law, does have an equal right with the seaman to a jury determination of unseaworthiness, negligence, causation, contributory negligence, and damages in a trial of this action. Rule 38 of Federal Rules of Civil Procedure. The shipowner's Petition redundantly recites this. Indeed, the Petitioner shipowner here has had just that right which the decisions of this Court accord it. The shipowner has had a jury trial of its liability for negligence and unseaworthiness and the jury resolved these issues against it finding liability. The Court of Appeals gave a new trial whereby the shipowner can again contend for the contributory negligence of the respondent seaman and for a redetermination of the damages for such contributory negligence, if any, as proven by the shipowner. The shipowner has the burden of proving such contributory negligence. What the shipowner really seeks in this Petition is to secure a new jury trial of its liability which it has failed to appeal to the Court of Appeals.

The Petitioner has failed to show in its Petition any reasons for granting the writ and review of the case by the Supreme Court as is set forth in Supreme Court Rule 19. It is not shown that the Court of Appeals decision

here, conflicts with the decision of another Court of Appeals or the decision of this Court. The Petitioner's stated question is not important for review since it has been reviewed by this Court in the many cases cited in the Petition, nor does the lower court's decision call for an exercise of the Supreme Court's supervisory powers.

Under the Jones Act (46 U. S. C. 688), liability of the shipowner for negligence and unseaworthiness are separate issues from the issue of the seaman's contributory negligence, since the latter is not a defense to shipowner's liability but only mitigates damages the seaman would otherwise be entitled to. Pope & Talbot v. Hawn, 346 U. S. 406, 408, 409 (1953); Socony-Vacuum Oil Company v. Smith, 305 U. S. 424, 431 (1939). See also Federal Employers Liability Act, 45 U. S. C. 53, which is incorporated by express terms in the Jones Act, 46 U. S. C. 688, where contributory negligence is not a bar to liability but only goes to mitigate damages.

The Court of Appeals has held that the issue of Petitioner's liability, which it did not appeal, is separate from the issue of the contributory negligence, if any, of respondent Mason. Because of the erroneous charge on contributory negligence the Court of Appeals has remanded the case to the District Court for a new jury trial of contributory negligence and a redetermination of the damages which may be affected by the finding of contributory negligence.

Title 28, U. S. C., Sec. 2106 provides as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may re-

mand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

In Thompson v. Camp, 167 F. 2d 733 (6th Cir. 1948), cert. denied, 335 U. S. 824, the plaintiff suing under the Federal Employers Liability Act, 45 U. S. C. 51, recovered a judgment and the Court of Appeals reversed because of an erroneous charge given by the District Court on plaintiff's damages. Since the defendant's liability had been established in the trial court, plaintiff moved that the new trial be confined solely as to the issue of damages he would be entitled to. In awarding a new trial solely as to these damages, the Court stated, 167 F. 2d 734:

"In spite of the early common law rule to the contrary, it appears now settled that this Court has the authority to limit the issues upon remand to the District Court for a new trial; and that such action does not violate the Seventh Amendment to the U.S. Constitution. Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188; May Department Stores Co. v. Bell, 8 Cir., 61 F. 2d 830, 842, 843, and cases cited. See also Empire Fuel Co. v. Lyons, 6 Cir., 257 F. 890, 897; Rule 59, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c."

In Atkinson v. Dixie Greyhound Lines, Inc., 143 F. 2d 477 (5th Cir. 1944), cert. denied, 323 U.S. 758, where the District Court erroneously charged the jury with reference to damages and the Court of Appeals reversed for a new jury trial of that issue, the Court stated, 143 F. 2d 479:

"It is now well established, notwithstanding doubt expressed in some earlier cases as to the common-law

power of a reviewing court to limit issues when ordering a new trial, that when error exists as to only one or more issues and the judgment is in other respects free from error, a reviewing court may, when remanding the cause for a new trial, whether by the court or a jury, limit the new trial to the issues affected by the error whenever these issues are entirely distinct and separable from the matters involved in other issues and the trial can be had without danger of complication with other matters * * *." American Jurisprudence, Vol. 3; State Life Ins. Co. of Indianapolis v. Hardy, 189 Miss. 266, 195 So. 708, 714; Schuerholz v. Roach, 4 Cir., 58 F. 2d 32; Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188; Moore's Federal Practice under the New Federal Rules, Vol. 3, page 3248; Federal Rules of Civil Procedure, Rule 59(a), 1938 Ed. p. 125. 28 U. S. C. A. following section 723c."

See also Washington Gas Light Company v. Connelly, 214 F. 2d 254 (DC Cir. 1954); Pedersen v. United States, 224 F. 2d 212 (2d Cir. 1955).

It therefore seems clear that the Court of Appeals here has ample authority to remand this case to the District Court for a new trial as to contributory negligence, because of the erroneous court charge and for a further redetermination of damages. Norfolk Southern Ry. Co. v. Ferebee, 238 U. S. 269 (1915). Petitioner shipowner will therefore get another jury trial as to respondent Mason's contributory negligence, which if proven will reduce damages, but the Petitioner cannot get any further trial of its liability since it failed to appeal this determination to the Court of Appeals.

POINT II. THERE IS WANT OF JURISDICTION TO CONSIDER THE PETITION SINCE THE PROCEEDINGS ARE NEITHER FINAL NOR COMPLETE.

The status of the present case is that the Court of Appeals has sent the case back to the District Court for another jury trial on contributory negligence of the respondent seaman, because of errors committed in the first trial of this issue. Damages which are affected or mitigated by contributory negligence in a Jones Act (46 U. S. C. 688) case must necessarily here be redetermined by the jury. The shipowner Petitioner did not appeal the jury determination of its liability in the District Court. There is no finality in the proceedings since the issue of contributory negligence must be resolved in a new trial and there is no judgment as to damages which also must be resolved. This case is not complete nor final. It is not ripe for review.

In Arnold v. United States ex rel Guimarin, 263 U. S. 427 (1923), the Court of Appeals modified the District Court's judgment, ordering another jury trial as to certain issues. Because the proceedings were not ready for review this Court dismissed the petition for writ of certiorari for want of jurisdiction stating, 263 U.S. 434:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. Hohorst v. Hamburg-American Packet Co. 148 U.S. 262, 264, 37 L. ed. 443, 444,

13 Sup. Ct. Rep. 590; Collins v. Miller, 252 U.S. 364, 370, 64 L. ed. 616, 618, 40 Sup. Ct. Rep. 347; Oneida Nav. Corp. v. W. & S. Job & Co. 252 U.S. 521, 522, 64 L. ed. 697, 40 Sup. Ct. Rep. 357; and cases therein cited."

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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